SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

DATE: 03/19/2020 TIME: 08:50:00 AM DEPT: 20

JUDICIAL OFFICER PRESIDING: Matthew P. Guasco
CLERK: Art Alvara
REPORTER/ERM:

CASE NO: **56-2018-00512761-CU-PL-VTA**
CASE TITLE: **Veneroso vs. C R Bard Inc**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Product Liability

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EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

On December 19, 2019, at 8:20 a.m., the matter came before the Court for a hearing concerning the following: (1) two motions of plaintiffs, Virginia Veneroso, Teresa Osso, Nicholas Veneroso, and Christina McCann, individually and on behalf of other survivors of the estate of Mario Venerosso ("decedent") (collectively, "plaintiffs") to seal exhibits; (2) motion of defendants, C.R. Bard, Inc., and Bard Peripheral Vascular, Inc. ("Bard defendants"), to seal exhibits; and (3) motion of Bard defendants for summary judgment, or, in the alternative, for summary adjudication of issues/claims as to the Complaint of plaintiffs. The parties appeared as set forth in the Clerk's minutes. The Court received and considered the pleadings and arguments of counsel submitted in support of and opposition to the motions. At the conclusion of the arguments, the Court took the matters under submission. The following are the Court's rulings on those submitted matters.

Sealing Motions

In support of the opposition to the Bard defendants' motion for summary judgment/adjudication, plaintiffs attached a number of exhibits. Pursuant to the parties' stipulated protective order regarding the treatment of confidential information, plaintiffs submitted certain of the exhibits provisionally under seal pending the Court's determination of whether these exhibits, or any portion thereof, should be sealed (that is, not included in the public record of this proceeding). In apparent compliance with the parties' stipulated protective order, plaintiffs filed two "motions" : one to seal these exhibits (Exs. 1, 2, 7, 13-18, 21-23, and 28-30), and the second to seal nine (9) exhibits attached to the declaration of Troy Brenes, counsel of record for plaintiffs, in opposition to the Bard defendants' motion to seal. In fact, plaintiffs' two motions are really notices to the Bard defendants triggering the opportunity of the Bard defendants to move to seal the exhibits pursuant to the provisions of California Rules of Court, rules 2.550 and 2.551. Plaintiffs' two motions do not seek this Court's order sealing the exhibits; plaintiffs oppose sealing for a variety of reasons discussed below.

Accordingly, the Court DENIES both of plaintiffs' motions as having been rendered moot. As to the nine (9) exhibits attached to Mr. Brenes's declaration in opposition to Bard defendants' motion to seal records, the time for Bard defendants to have moved to seal those documents pursuant to the parties' stipulated protective order has passed. Those nine exhibits shall be transferred by the Clerk to the public record immediately.

The only true sealing motion before the Court is that filed by the Bard defendants. For the following reasons, the Court DENIES the Bard defendants' motion to seal Exhibits 1, 2, 7, 13-18, 21-23, and 28-30 which accompany plaintiffs' opposition to the motion for summary judgment/adjudication:

(1) The exhibits as to which Bard defendants seek this Court's sealing order are the following:

Ex. 1: internal memorandum re business acquisition

Ex. 2: internal document re Recovery® filter

Ex. 7: internal document re evaluation of Recovery® filter

Ex. 13: internal communication re training materials

Ex. 14: internal document re safety evaluation of Recovery® filter

Ex. 15: report created by consultant retained by Bard defendants' legal department to analyze the Recovery® filter and created in anticipation of litigation following reported deaths associated with the Recovery® filter ("Lehman report")

Ex. 16 those excerpts consisting of internal documents re safety evaluation of Recovery® filter which are claimed to be attorney work-product

Ex. 17: internal communications re IVC filters

Ex. 18: internal document re sales data

Ex. 21: internal communication re business plans

Ex. 22: internal communication re IVC filters

Ex. 23: internal document re safety evaluation of G2®

Ex. 28: internal document re business plan

Ex. 29: internal communication re IVC filters

Ex. 30: internal document re safety evaluation of Recovery® filter

(2) Regardless of the parties' stipulation, all documents filed in an action, including exhibits, are part of the public record. Sealing pleadings or evidence submitted in an action is a direct impairment of the public's constitutional right of free access to matters litigated in the courts. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (Locke)* (1999) 20 Cal.4th 1178, 1217-18, 86 Cal.Rptr.2d 778, 980 P.2d 337; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 600, 57 Cal.Rptr.3d 215; *Huffy Corp. v. Superior Court (Winterthur Swiss Ins. Co.)* (2003) 112 Cal.App.4th 97, 104, 4 Cal.Rptr.3d 823.)

(3) In order to override the public's constitutional right of access to public actions in the public's courts, California Rules of Court, rule 2.551, subdivision (d), requires the Court to expressly find the following factors:

> "(1) There exists an overriding interest that overcomes the right of public access to the record;
>
> (2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest."

(4) Bard defendants have the burden of presenting evidence of each of these factors supporting the requested sealing. (*H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894, 60 Cal.Rptr.3d 501.)

(5) The Court finds that Bard defendants have failed to meet their burden of demonstrating the existence of an overriding interest, or substantial prejudice, or narrow tailoring, the absence of less restrictive means, or that the asserted interests in favor of sealing overcome the public's right of access in court proceedings. Preliminarily, the Court finds that the declarations submitted by Bard defendants, at best, establish the reasons why Bard defendants do not want the exhibits in question to be made public. The declarations, however, lack sufficient facts, as opposed to conclusions, concerning the prejudice Bard defendants argue will flow from the exhibits being part of the public record.

(6) Additionally, the Court finds that all of the exhibits except Exhibit 18 have been part of the public record in other litigation involving the vena cava filter at issue here. Prior publication of these exhibits, whether in court proceedings or otherwise, defeats any claim that they should be sealed in this action pursuant to the trade secret privilege. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304, 116 Cal.Rptr.2d 833.)

(7) As to Exhibit 18, Bard defendants' declarations that internal company sales information might be misunderstood by the public if not sealed falls short of demonstrating either an interest which overrides the public's right of access to legal proceedings or substantial prejudice.

(8) Bard defendants argue that Exhibits 15 and 16 are protected by the attorney work product doctrine. The objection has arguable merit, but it applies to the question of the *admissibility* of those documents at trial. That objection does not equate to an overriding interest requiring that these documents be *sealed* in contravention of the public's right of access to the records of this action. Often, exhibits which are marked and identified during the trial of an action may be inadmissible as against a privilege or work product objection, yet they do not meet the criteria for being shielded from the public by means of sealing. The Court reaches this conclusion regardless of the res judicata/collateral estoppel argument raised by plaintiffs concerning the effect, if any, the Court should give the orders of other courts granting or denying sealing of these documents. The Court concludes that such rulings by other courts are not conclusive determinations binding on this Court.

(9) The Court directs the Clerk to transfer Exhibits 1, 2, 7, 13-18, 21-23, and 28-30, submitted by plaintiffs provisionally under seal in support of their opposition to the motion for summary judgment/adjudication, to the public file.

Motion for Summary Judgment/Adjudication

Requests for Judicial Notice

The Court GRANTS Bard defendants' request for judicial notice of Exhibits A, B and C attached to the request (FDA information and regulations). These are properly the subject of permissive notice. (Evid. Code, § 452, subds. (b), (c).)

The Court GRANTS plaintiffs' request for judicial notice of the following exhibits accompanying the opposition: 4-6, 24-27, 32. These FDA documents are properly subject to permissive judicial notice.

(Evid. Code, § 452, subds. (b), (c).)

Evidentiary Objections

The Court SUSTAINS plaintiffs' objection number 3 to the declaration of Richard Tabura IN PART (not as substantive evidence of existence of clotting disorder). The objection is OVERRULED IN PART (received for limited purpose of describing basis of Dr. McDonald's opinion)

The Court OVERRULES plaintiffs' objection numbers 1 and 2 to Mr. Tabura's declaration.

The Court OVERRULES each of plaintiffs' objections numbers 1-7 to the declaration of Christopher S. Morris, M.D.

The Court SUSTAINS Bard defendants' objection numbers 1 and 3 (IN PART, as to exhibits only) to the declaration of Troy Brenes. The Court OVERRULES Bard defendants' objection numbers 2 and 3 (IN PART as to content of declaration), and 4-5 to Mr. Brenes's declaration.

The Court OVERRULES Bard defendants' objection numbers 6-12 to the declaration of Robert McMeeking.

Undisputed Material Facts ("UMF"s) and Plaintiff's Additional Material Facts ("AMF"s)

For the purposes of this motion only, the Court makes the following findings concerning the UMFs and AMFs.

Preliminarily, both Bard defendants and plaintiffs misunderstand the format requirements for a separate statement and a responsive separate statement pursuant to rule 3.1350, subdivision (d). Bard defendants' separate statement has a core of 64 UMFs. Variations of these same 64 UMFs are repeated with different numbers for each of the seven issues as to which summary adjudication is sought. The net effect of this needless duplication and renumbering of the same core material facts is a total of 249 discrete UMFs, with variations of the first 64 UMFs having different numbers depending on the issue. Plaintiffs continue this confusing practice by introducing AMFs 65-146, but then using the same core AMFs with varying number designations multiplied to produce a much greater and duplicative number of AMFs. The purpose of the separate statement is to facilitate the Court's task of determining the presence or absence of material triable issues, not to make that task unduly burdensome and time consuming.

The Court, therefore, addresses only UMFs 1-64 and AMFs 65-146 in its findings below. Any further findings differentiating specific additional UMFs and AMFs beyond these numbers is unnecessary.

The Court finds the following UMFs are established by the supporting evidence and are undisputed: 1-3, 5-7, 9, 13-17, 21-25, 27, 29, 31-32, 35-36, 43-46, 48, 51, 53, 56-57, 59, and 61.

The Court finds the following UMFs are established by the supporting evidence, are purportedly disputed or objected to, but are genuinely undisputed: 11, 18, 19, 36, 42, 47, 49, 50 (except for the truth of decedent's history of "clotting disorder"), 52, and 58.

The Court finds the following UMFs are not established by the supporting evidence and/or are materially disputed: 4, 8, 10, 12, 20, 26, 28, 30, 33-34, 37-41, 54-55, 60, 62-64.

The Court finds the following AMFs are established by the supporting evidence: 65, 72-75, 77-80, 81 (in large part), 82 (in part), 93-103, 105-142, and 146.

The Court finds the following AMFs are not established by the supporting evidence: 66-67, 69-71, 76,

81-82 (in part), 83-92, 104, and 143-145.

Legal Principles Governing Summary Judgment/Adjudication

Summary judgment procedure is well settled: "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code of Civ. Proc., § 437c, subd. (a).) A party may also move for "summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty. . . ." (Code of Civ. Proc., § 437c, subd. (f)(1).) "The court must grant the motion if all the papers submitted show that there is no triable issue as to any material fact [citation omitted]-that is, there is no issue requiring a trial as to any fact that is necessary under the pleadings and, ultimately, the law [citations omitted]-and that the moving party is entitled to a judgment as a matter of law [citation omitted]." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855-56, 107 Cal.Rptr.2d 841, 24 P.3d 493, internal quotation marks omitted ("*Aguilar*").) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Id.*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The court must construe the evidentiary showing, and all reasonable inferences therefrom, in the light most favorable to the opposing party. (*Id.*, 25 Cal.4th at p. 857, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

The Court follows a three-part test in ruling on the motion:

(a) "First, . . . the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

(b) "Second, . . . the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact."(*Ibid.*)

(c) "Third, . . . how the parties moving for and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which would bear what burden of proof at trial." (*Id.*, 25 Cal.4th at p. 851, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

In determining whether a material triable issue exists, the Court must construe the evidence offered by the moving party in support of the motion strictly and the evidence offered in opposition to the motion liberally. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839, 89 Cal.Rptr.2d 540.) Moreover, the Court is not permitted to weigh or assess the credibility of, or resolve conflicts concerning, the evidence offered in support of or opposition to the motion; conflicts in the evidence must be resolved by the trier of fact, not the Court. (Code of Civ. Proc., §437c, subd. (e); *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1397, fn. 4, 93 Cal.Rptr.2d 763; *AARTS Productions, Inc. v. Aetna Life Ins. Co.* (1986) 179 Cal.App.3d 1061, 1064, 225 Cal.Rptr. 203.)

Ruling on Motion

For the following reasons, the Court DENIES Bard defendants' motion for summary judgment, but the Court GRANTS IN PART AND DENIES IN PART the motion for summary adjudication of issues/claims:

(1) Summary Judgment (causation): The Court DENIES Bard defendants' motion for summary judgment. The motion for summary judgment focuses on the element of causation. In a medical product defect case such as this, the element of causation requires plaintiffs to present competent expert opinion testimony to a reasonable degree of medical probability that the device was defective and that said defect was a substantial contributing factor in producing the injury at issue. (*Cottle v. Superior*

Court(1992) 3 Cal.App.4th 1367, 1385, 5 Cal.Rptr.2d 882; *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-03, 209 Cal.Rptr. 456.)

(2) Bard defendants have met their initial burden of production and persuasion that the element of causation is negated. Thus, the burden shifts to plaintiffs to produce expert evidence of a material triable dispute as to causation. Plaintiffs have met that burden. Plaintiffs have produced the declaration of Derek Muehrcke, M.D., a cardiothoracic surgeon with approximately 24 years of experience. Dr. Muehrcke is well-qualified to offer an opinion on the issue of causation in this case. Dr. Muehrcke opines that the G2 vena cava filter implanted in plaintiffs' decedent malfunctioned by becoming unstable and tilting after implantation, perforating the vena cava, and permitting a fatal embolus or clot to cause the decedent's death. Both the plaintiffs' and Bard defendants' experts agree that the filter was designed and intended to be stable, not dislodge, or shift, perforate the vena cava, and allow large clots to bypass the filter.

(3) Accordingly, there is a material triable dispute on the essential element of causation which precludes summary judgment. This disputed factual question must be resolved by the trier of fact. The Court is not permitted to substitute its judgment resolving the conflict between the experts on the issue of causation for that of the jury. The Court, therefore, DENIES Bard defendants' motion for summary judgment.

(4) First & Third Causes of Action (manufacturing defect): The Court DENIES the Bard defendants' motion for summary adjudication of these causes of action. In order to succeed on a cause of action for strict product liability, plaintiffs must prove each of the following elements: (a) Bard defendants placed a product on the market; (b) defendants knew that the product would be used without inspection for defects; (c) the product was defective, either in its manufacture, or its design, or by virtue of the defendants' failure to warn concerning known risks and dangers when the product is used in a reasonably foreseeable manner; (d) substantial factor causation; and (e) injury. (*Nelson v. Superior Court (Exxon Mobil Corp.)* (2006) 144 Cal.App.4th 689, 695, 50 Cal.Rptr.3d 684.) Plaintiffs allege both a manufacturing defect as well as a failure to warn concerning the G2 vena cava filter.

(5) A manufacturing defect claim (whether in negligence or strict liability), requires plaintiffs to prove the following elements: (a) the product deviated from the manufacturer's intended result; or (b) the product deviated from other ostensibly identical units of the same product line. (*Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413, 429, 143 Cal.Rptr. 225, 573 P.2d 443.) Plaintiffs must also prove that a manufacturing defect existed at the time the device left Bard defendants' possession. (*Jimenez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 383, 93 Cal.Rptr. 769, 482 P.2d 681.)

(6) The Court finds that Bard defendants have failed to meet their initial burden of production and persuasion negating one or more of the necessary elements of plaintiffs' manufacturing defect claims. Bard defendants have simply not presented any evidence of the vena cava filter's condition when it was removed from the body of plaintiffs' decedent, so there is no evidence about whether that product as manufactured deviated from other products of the same line. Nor have the Bard defendants presented any substantial evidence concerning the vena cava filter's condition upon manufacturer and shipment to market. The burden does not shift to plaintiffs to demonstrate a material triable issue on the manufacturing defect claims. The Court denies summary adjudication of these two causes of action for that reason alone.

(7) Even if Bard defendants had met their initial burden and the burden then shifted to plaintiffs, however, Dr. Muehrcke's declaration creates a triable issue that the vena cava filter performed in a manner that deviated from its intended design, which is circumstantial evidence of a manufacturing defect.

(8) First & Second Causes of Action (failure to warn): The Court DENIES Bard defendants' motion for summary adjudication of the failure to warn causes of action. A medical device manufacturer does not

have a duty to warn directly patients of risks associated with their products. (*Carlin v. Superior Court (Upjohn Company)* (1996) 13 Cal.4th 1104, 1118, 56 Cal.Rptr.2d 162, 920 P.2d 1347.) Instead, a manufacturer of medical devices fulfills its legal obligations by providing the physician with adequate warnings concerning the product. (*Brown v. Superior Court (Abbott Laboratories)* (1988) 44 Cal.3d 1049, 1061-62, 245 Cal.Rptr. 412, 751 P.2d 470.) This is referred to as the learned intermediary doctrine. The manufacturer, however, does not escape strict liability if its warnings to the prescribing physician (the "learned intermediary") are inadequate. (*Toole v. Richard-Merrell, Inc.* (1967) 251 Cal.App.2d 689, 709, 60 Cal.Rptr. 398.) By virtue of the learned intermediary doctrine, Bard defendants did not have a duty to warn plaintiffs' decedent directly, but fulfilled their duty if they provided adequate warnings concerning the vena cava filter to the decedent's treating physicians.

(9) The Court finds that Bard defendants have met their initial burden of production and persuasion that they provided adequate warnings concerning the G2 filter. Additionally, Bard defendants provide the testimony of decedent's treating physician, Dr. Purmer, who stated that there were no additional warnings which would have altered his decision to use the G2 filter as an anti-clotting approach given the decedent's medical condition.

(10) The burden shifts, therefore, to plaintiffs to demonstrate a material triable issue on the question of the adequacy of the warnings provided to physicians concerning the vena cava filter. The Court finds that plaintiffs have met that burden. Plaintiffs have presented evidence that Bard defendants knew that the G2 and RNF filters experienced substantially higher reported failure rates than other filter devices, and that they were prone to tilting even when properly implanted, and that the probable cause of these problems was an insufficient anchoring mechanism. Plaintiffs presented evidence that Bard defendants were working on alternative designs for the filter at the time of the implantation of the G2 device in decedent in order to remedy these problems. The evidence produced by plaintiffs suggests that these quality and safety issues were known to the Bard defendants approximately seven years before the implantation of the filter in decedent. This information has led plaintiffs' expert, Dr. Muehrcke, to opine that Bard defendants did not disclose the risk of failure as described above to prescribing physicians like Dr. Purmer. Thus, plaintiffs have presented a material triable question of fact about the adequacy of the warnings which a jury, not this Court, must resolve. (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320, 273 Cal.Rptr. 214.)

(11) Bard defendants argue that, since Dr. Purmer has testified he would not have changed his decision to use the G2 filter even if he had been warned accurately about its failure rate, the element of causation is missing as a matter of law. (*Motus v. Pfizer Inc.* (9th Cir., 2004) 358 F.3d 659, 661.) Plaintiffs, however, have offered excerpts of Dr. Purmer's testimony in which he admitted that he would not have implanted the G2 vena cava filter in decedent if he had been made aware that (a) the G2 had a substantially higher reported failure rate than the SNF; (b) that large blood clots could get past the filter and reach a patient's lungs; and (c) the device itself could migrate to the patient's heart even if properly placed. Thus, plaintiffs have produced evidence demonstrating a material triable issue as to causation in the context of the failure to warn causes of action.

(12) First Cause of Action (negligence): The Court DENIES the motion for summary adjudication of the claim of negligence in the first cause of action. The Complaint alleges that Bard defendants breached their duty to exercise reasonable care in the development, testing, design, manufacture, inspection, marketing, labeling, promotion, distribution and sale of the G2 filter. As a general tort principle, manufacturers owe consumers of their products a duty to use reasonable care in the design and manufacture of any product that, if carelessly made, is likely to injure persons when used in a reasonably foreseeable manner. (*Reynolds v. Natural Gas Equipment, etc.* (1960) 184 Cal.App.2d 724, 736, 7 Cal.Rptr. 879.) Manufacturers of prescription medical products may be liable for negligence depending on the risks they knew or reasonably should have known about, the severity of the potential harm created by reasonably foreseeable uses of the product, and the burden upon the manufacturer of implementing safety measures to reduce or avoid the risk of potential harm to users of the product. (*California Civil Jury Instructions* ("CACI") No. 1221; *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187

Cal.App.4th 1220, 1229-30, 115 Cal.Rptr.3d 151.)

(13) The Court finds that Bard defendants failed to meet their initial burden of production and persuasion that they met their duty of care as described above such that plaintiffs' negligence claim is negated. The FDA clearance does not suffice to meet Bard defendants' initial burden. The burden does not shift to plaintiffs to demonstrate a material triable dispute on this claim.

(14) Fourth & Fifth Causes of Action (express & implied warranty): The Court GRANTS Bard defendants' motion for summary adjudication of the express and implied warranty causes of action. Implanted medical devices are expressly exempted from the implied warranty of fitness for a particular purpose pursuant to Civil Code section 1793.2. Plaintiffs impliedly concede this point by not addressing it in the opposition.

(15) As it relates to the express warranty claim, Bard defendants have met their initial burden of production and persuasion that plaintiffs cannot demonstrate the necessary element of contractual privity with the manufacturer. (*Burr v. Sherwin Williams Co.* (1954) 42 Cal.2d 682, 695, 268 P.2d 1041.) The burden shifts to plaintiffs to produce evidence of a material triable dispute as to contractual privity. Plaintiffs concede they lack privity, but argue that the "foodstuffs" exception to the privity doctrine applies here. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 720-21, 110 Cal.Rptr.2d 722.) Implanted medical products, however, are not considered "foodstuffs" within the meaning of this exception to the privity requirement. (See *Evraets v. Intermedics Intraocular, Inc.* (1994) 29 Cal.App.4th 779, 34 Cal.Rptr.2d 852.)

(16) Moreover, a breach of express warranty claim requires plaintiffs to prove that Bard defendants made statements or representations to the decedent concerning the vena cava filter. (*Blanco v. Baxter Healthcare Corp.* (2008) 158 Cal.App.4th 1039, 1058-59, 70 Cal.Rptr.3d 566; *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 189, 6 Cal.Rptr.3d 494.) Plaintiffs do not produce any evidence in opposition to Bard defendants' showing that no such statement or representation was made to the decedent which could give rise to an express warranty claim.

(17) For these reasons, the Court GRANTS the motion for summary adjudication of the express and implied warranty causes of action. Bard defendants are entitled to summary judgment as to each as a matter of law.

(18) Sixth Cause of Action (negligent misrepresentation): The Court DENIES Bard defendants' motion for summary adjudication of the negligent misrepresentation cause of action. To succeed on a claim of negligent misrepresentation, a species of non-intentional fraud, plaintiffs must prove that (a) Bard defendants made an assertion of fact in relation to the G2 filter; (2) the factual assertion was false; (c) Bard defendants did not have any reasonable basis upon which to believe the assertion was true; (d) decedent justifiably and detrimentally relied on said factual assertion; (e) causation; and (f) injury. (*SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Ca.App.5th 146, 154, 239 Cal.Rptr.3d 788; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962, 226 Cal.Rptr. 532.)

(19) It is undisputed that the decedent did not receive or rely upon any marketing representations by Bard defendants concerning the G2 filter. Plaintiffs, however, have produced evidence that Bard defendants did provide marketing materials which were untruthful concerning the safety and effectiveness of the G2 filter, and which concealed critical safety data concerning the filter's failure statistics from physicians generally and Dr. Purmer specifically. In the instance of medical products, the detrimental reliance essential to a claim of negligent misrepresentation may be by the physician and not necessarily the patient. (*Toole v. Richard-Merrell, Inc.*, *supra*, 251 Cal.App.2d at p. 707, 60 Cal.Rptr. 398.)

(20) Although the Court finds that Bard defendants met their initial burden of production and persuasion on this claim, plaintiffs have produced enough direct and indirect evidence to create a material triable

issue of fact as to negligent misrepresentation in marketing of the G2 filter. This factual dispute must be resolved by the trier of fact, not the Court. Accordingly, the Court DENIES Bard defendants' motion for summary adjudication of this claim.

(21) Eighth Cause of Action (wrongful death): The Court DENIES Bard defendants' motion for summary adjudication of this claim, which is really derivative of the other causes of action. The separate statement and memorandum of points and authorities submitted by Bard defendants omit any mention or discussion of this challenge. Given the Court's rulings above denying summary judgment as well as summary adjudication of the principal causes of action, plaintiffs have the right to go forward on this wrongful death action.

(22) Punitive Damages: The Court GRANTS Bard defendants' motion for summary adjudication of the claim for punitive damages. The Court finds that Bard defendants met their burden of production and persuasion that there is no clear and convincing evidence they engaged in malice, fraud, or oppression sufficient to permit a reasonable trier of fact to award punitive damages, assuming the truth of plaintiffs' allegations. (Civ. Code, § 3294, subd. (a).) Bard defendants have produced evidence that the G2 filter was manufactured and produced with all necessary regulatory approvals. (*Virtanen v. O'Connell* (2006) 140 Cal.App.4th 688, 712, 44 Cal.Rptr.3d 702.) Plaintiffs fail to counter this showing in any meaningful way. Bard defendants are entitled to summary adjudication of the claim for punitive damages as a matter of law.

The Clerk shall give notice of this ruling. Counsel for Bard defendants shall serve and file a proposed order consistent with the above and in conformity with the Code of Civil Procedure and the California Rules of Court.